

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1220

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
JACQUES BERENGUER,
Defendant-Appellant.

*B
P/s*
Docket No. 77-1220

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



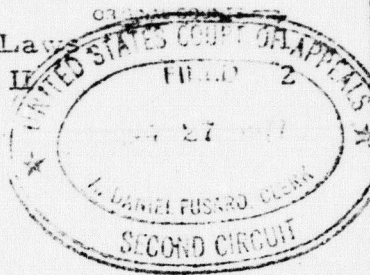
WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JACQUES BERENGUER

FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

OFFENSES CHARGED
Consp. to viol. Fed. Narco. Law
Distr. & possess. of Cocaine II



☐ AMT	☐ Fugitive
☐ Unsett	☐ Pers. Record
☐ Set	☐ PSA
☐ 000	conditions
☐ Date	☐ 10% Deposit
☐ Bail Not Made	☐ Surety Bond
☐ Status Changed	☐ Collateral
☐ Use Booklet	☐ 3rd
	☐ Priv Cst
	☐ Other

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
Custody Began 8/18/76 4: p.m. Summons Served First Appearance	High Risk Date 8-26-76 Information Indict. Waived In Charging District Superseding ☐ Indict/Info	Trial Set For 1st Plea 9-2-76 Final Plea NG ☒ G ☐ NOL G Plea W/Drawn NG ☐ G ☐ NOL	Void Date Trial Began 11-15-76 Trial Ended 11-19-76 Discussed of Charges ☒ Convicted ☐ Acquitted ☐ Dismissed ☐ On Government's Motion	1-10-77 ☒ On All Charges ☐ On Lesser Offense ☐ WOP: ☐ WP

		MAGISTRATE			
Search Warrant	Issued	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	8/19/76
	Return			PRELIMINARY EXAMINATION OR	Date Scheduled
Summons	Issued			☐ REMOVAL HEARING ☐ WAIVED ☒ NOT WAIVED ☐ INTERVENING INDICTMENT	Tape Number
	Served				
Arrest Warrant issued					
COMPLAINT		8/19/76	MDJ-08AB		
OFFENSE (in Complaint)		21 USC 812,841(a)(1),841(b)(1)(A) - NARCOTICS			

Alan Levine
791-0932

Nancy Rosner

Defense: ☐ CJA, ☐ Bat: ☐ Waived, ☐ Set ☐ None ☒ Other ☐ PD, ☐ SD

DATE _____ (DOCUMENT NO.) _____ PROCEEDINGS _____

EXCLUDABLE DELAY

8/19/76 Complaint filed, John C. Corbett, Esq., 66 Court St., Bklyn, N.Y.
Defendant remanded into the custody of U.S. Marshal in lieu of
\$750,000 cash or surety.

8-26-76 Indictment filed, 76 CR 832, SDNY.

9-2-76 Deft. (Atty. not present) pleads not guilty. Deft. cont'd
remanded in lieu of bail as fixed by Magistrate at
\$750,000. Case assigned to Werker, J. Werker J.

9-20-76 Case is reassigned to Judge Stewart, m/n

11-10-76 Filed defts. Jacques Berenguer's proposed Voir Dire
examination of the Jury panel.

11-11-76 Filed Govt's request to charge.

po

A

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY	
DATE	DOCUMENT NO.	FILED	RECEIVED	EXCLUDABLE DELAY	REMARKS
11-15-76	Jacques Berenquer - Interpreter Jacqueline Montagu sworn, atty Nancy Roman present. Trial begun. STEWART, J.				
11-16-76	Trial cont'd.				
11-17-76	Trial cont'd.				
11-18-76	Trial cont'd.				
11-19-76	Trial cont'd & concluded. Jury finds deft. Guilty on each of Cts. 1 & 2 as charged in this Indictment. P.S.I. ordered. No bail. Sentence adj'd. to 12-17-76 at 9:30 AM.....STEWART, J. (ATTY PRESENT)				
12-10-77	Filed JUDGMENT & COMMITMENT The deft is hereby committed to the custody of the Atty general or his authorized representative for imprisonment for a period of TWO (2) YEARS on each of counts 1 & 2 to run concurrently with each other. Pursuant to Title 21, Section 841 U.S.C., the deft is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement....Stewart, J. issued copies				
1-13-77	Filed commitment & entered prison, Book delivered to WARDEN FED. DEPT. 14045 N.Y.C. ON 1-10-77				
1-18-77	Filed Magistrates temporary commitment				
1-20-77	Filed notice of appeal of the judgment of conviction entered on 1-10-77 (mailed notice to deft) & U.S. Atty				

A TRUE COPY

RECEIVED BY RAYMOND F. BURGEARDT

By J. F. Tinner
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CRIM. 0832

UNITED STATES OF AMERICA,

-v-

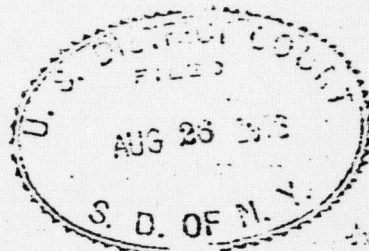
JACQUES BERENGUER,
a/k/a Guy Sebbane, and
JOSALITO GARCIA,

Defendants .

INDICTMENT

76 Cr.

COUNT ONE



The Grand Jury charges:

1. From on or about the 1st day of May, 1976 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JACQUES BERENGUER, a/k/a Guy Sebbane and JOSALITO GARCIA,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about May 14, 1976 in the Southern District of New York, JACQUES BERENGUER, a/k/a Guy Sebbane, the defendant, met with an agent of the Drug Enforcement Administration and offered to sell approximately 5 kilograms of cocaine for \$40,000 a kilogram.
2. On or about May 18, 1976 in the Southern District of New York, JACQUES BERENGUER, a/k/a Guy Sebbane, and JOSALITO GARCIA, the defendants met with an agent of the Drug Enforcement Administration at the Howard Johnson's Motor Inn, 869 8th Avenue, New York, New York.
3. On or about May 19, 1976 in the Southern District of New York, JOSALITO GARCIA, the defendant, met with another individual in the vicinity of 75th Street between Amsterdam and Broadway, New York, New York, and showed the individual approximately 3 kilograms of cocaine.
4. On or about May 20, 1976 in the Southern District of New York, JACQUES BERENGUER, a/k/a Guy Sebbane, and JOSALITO GARCIA, the defendants, met with an agent of the Drug Enforcement Administration at Rudi's Bar and Grill, 44th Street and 9th Avenue, New York, New York.

OVERT ACTS (cont'd)

5. On or about May 20, 1976 in the Southern District of New York, JOSALITO GARCIA sold to an agent of the Drug Enforcement Administration approximately 23.91 grams of cocaine for \$1,200 as a sample of the future sale of 5 kilograms of cocaine.

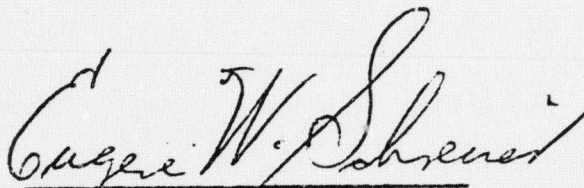
(Title 21, United States Code, Section 846.)

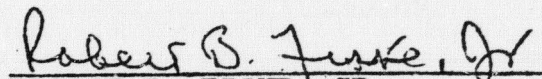
COUNT TWO

The Grand Jury further charges:

On or about the 20th day of May, 1976 in the Southern District of New York, JACQUES BERENGUER, a/k/a Guy Sebbane, JOSALITO GARCIA the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II controlled substance, to wit, approximately 23.91 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)


FOREMAN


ROBERT B. FISKE, JR.
United States Attorney

NOV 15 1976

Joselito GARCIA - atty. Elliot A. Laikoff & present. Deft. withdraws N.G. plea as to Ct. 2 only + now pleads Guilty to Ct. 2. PSI ordered. No bail. Sentence adj'd sine die.

J.A. Stewart, J.

NOV 18 1976

WAVIN, ~~Att~~

Jacques BERENQUER - Interpreter Jacqueline Montager sworn, atty. Nancy Rasner present. Trial begun.

NOV 16 1976

- Trial cont'd

NOV 17 1976

"

NOV 18 1976

"

NOV 19 1976

"

"

+ concluded. Jury finds deft.

Guilty on each of Cts. 1 + 2 as charged in the Indictment. PSI ordered. No bail. Sentence adj'd to 12/17/76 at 9³⁰ A.M.

WAVIN, ~~Att~~

JAN 10 1977

Jacques BERENQUER Interpreter Marcia Cartelma sworn, atty. Nancy Rasner, Esq. present. 2 YRS - ~~to be~~ Special Parole. 3 YRS. on each of Cts. 1 + 2 to run concurrently with each other.

76 CRIM. 0832

JUDGE WERKER

Stewart

Form No. USA-338-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

JACQUES BERENGUER,
a/k/a Guy Sebbane, and
JOSALITO GARCIA,

Defendants.

INDICTMENT

(21, USC, §§ 812, 841(a)(1)
841(b)(1)(A) and 846)

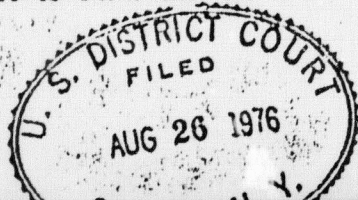
ROBERT B. FISKE, JR.

United States Attorney

A TRUE BILL

Eugene W. Schreiner
Foreman

FPI-SS-1-13-70-20M-4925



8-26-76

BENCH WARRANT ORDERED

See Dr. St. Joseph to Garcia

and Indictment Ordered Filed

Werkner, J

9-2-76 - Deft. Jacques Berenguer
(atty. Nancy Roemer, not present) Pleads
NOT GUILTY. Deft. continued remanded
in lieu of bail as fixed by Magistrate
ie \$750,000. a

Deft. Josalito Garcia
(atty. Edward Chase) pleads NOT GUILTY
Deft. continued remanded in lieu of
as fixed by Magistrate, ie \$5000. c

Assigned Werkner for all
purposes. Werkner

Six 17 1976. Pre-trial conference held.
Deft. Josalito Garcia. Bail application
granted to increase to \$20,000. cash or
surety. Trial November 15, 1976
Stewart J.

1 jg 1

2 AFTERNOON SESSION

3 2.15 P. M.

4 (Jury present)

5 CHARGE OF THE COURT

6 (Stewart, J.)

USA vs.
Berenguer
76 Cr. 832

7 Ladies and gentlemen, we have now come to the
8 part of the case where the evidence is in and the lawyers
9 have presented their closing arguments and I am about to
10 tell you what the law is applicable to this case and then
11 it will be up to you to deliberate on your verdict.

12 I want to impress upon you that you are the
13 sole and exclusive judges of the facts. You pass upon the
14 weight of the evidence, you resolve such conflicts as there
15 may be in the evidence, you draw such reasonable inferences
16 as may be warranted by the testimony or the exhibits in the
17 case.

18 As I've just indicated, my function is to
19 instruct you on the law and it is your sworn duty to accept
20 the law, not what the lawyers may have said the law is but
21 as I say it to you in these instructions.

22 With respect to any fact matter, it is your
23 recollection and yours alone that governs. Anything that
24 counsel may have said, either for the Government or for the
25 defendant, whether during the trial or in the form of

argument, is not to be substituted for your own recollection of the evidence. Also, anything that I may have said at any time is not to be taken in place of your own recollection.

In considering the evidence and in deciding what the facts are, you may not take into account or consider in any way any extraneous matters, such as anything that happened outside this courtroom or in the jury room or anywhere in the courthouse, or any other place. Only the evidence presented in court may be considered by you.

The fact that the Government is a party, that is, that the prosecution here is handled in the name of the United States, entitles it to no greater consideration than that accorded to any other party to the litigation. By the same token, it is entitled to no less.

There are some general principles of law which I want to repeat to you. Remember that the indictment is only an accusation, a charge. It is not evidence of anything. You will give no weight to the fact that an indictment has been returned against this defendant.

The defendant has pled not guilty. Therefore, the Government has the burden of establishing and proving beyond a reasonable doubt, by competent evidence, the charges made against him. Whether this burden is sustained

does not depend upon the number of witnesses or the quantity of the testimony but rather on the nature and the quality of the testimony and of the evidence. This burden on the Government is one that never shifts and remains upon the Government throughout the entire trial.

A defendant does not have to prove his innocence. On the contrary, a defendant is presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in the defendant's favor when the trial began, it was present during the trial, and it remains in his favor now as I instruct you. Furthermore, it remains in his favor during the course of your deliberations in the jury room and is overcome only if and when you are satisfied that the Government has sustained its burden, a burden of proving beyond a reasonable doubt the guilt of the defendant.

It is for this reason that a defendant does not need to take the witness stand, and in fact the defendant in this case has not testified. The Constitution and our laws provide that in any criminal matter a defendant is under no obligation to come forward to testify, or indeed to produce any evidence, because the burden of proving a violation of law is solely on the Government.

So you are not to draw any inference from the

jg 4

defendant's failure to do so, and in fact you must not speculate upon it or consider it in any way in your deliberations. The defendant has the absolute right not to make any defense and to rely on the Government's burden to prove him guilty beyond a reasonable doubt.

You have heard the phrase "reasonable doubt" many times. Reasonable doubt is such a doubt as would cause you to hesitate to act in a matter of importance in your own lives. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is one which appeals to your reason, your judgment, your own experience. It is not caprice, speculation, whim. It is not an excuse to avoid the performance of an unpleasant duty. Speculative, imaginary qualms or misgivings are not reasonable doubts.

It is not necessary for the Government to prove the guilt of a defendant to a mathematical certainty or beyond all possible doubt. It would be practically impossible for a person to be absolutely and completely convinced of any controverted fact, which by its very nature is not susceptible of mathematical certainty. So the law is that in a criminal case, like this, it is enough if proof that a defendant is guilty is established beyond a reasonable doubt, though not beyond all possible doubt.

1
2 If, after a fair and impartial consideration
3 of all the evidence in the case or the lack of it, you can
4 honestly say that you have such a doubt that would cause
5 a prudent person to hesitate before acting in matters of
6 importance to himself, then you have a reasonable doubt
7 and in that circumstance it is your duty to acquit.

8 If, on the other hand, after a fair and impar-
9 tial consideration of all the evidence, you can honestly
10 say you have such an abiding conviction of the guilt of
11 the defendant that you would be willing to act upon this
12 conviction in important and weighty matters in the personal
13 affairs of your own life, then you have no reasonable
14 doubt and in that circumstance it is your duty to convict.

15 A reasonable doubt may arise not only from the
16 evidence presented but also, as I said, from the lack of
17 evidence, since the burden is always on the Government to
18 prove the defendant guilty of every essential element of
19 the crime charged beyond a reasonable doubt.

20 As I mentioned when the trial began, the charges
21 in this case are in an indictment which alleges that the
22 defendants, Jacques Berenguer, also known as Guy Sebbane,
23 and Josalito Garcia, violated certain provisions of the
24 federal narcotics laws. The allegation in the indictment
25 that the defendant may use two names should not be consid-

1 jg 6

2 ered in any way. You should not infer anything from the
3 fact that there are two names for the defendant in the
4 indictment.

5 I am now going to read to you those portions
6 of the federal narcotics laws that are referred to in the
7 indictment. Title 21, Section 841 states: "It shall be
8 unlawful for any person knowingly or intentionally to ...
9 distribute ... or possess with intent to ... distribute ...
10 a controlled substance."

11 Title 21, Section 812 defines the term "con-
12 trolled substance" to include cocaine.

13 Title 21, Section 846 makes it a crime to
14 conspire or agree to commit certain crimes, including the
15 one which I have just described.

16 The first count in the indictment charges, and
17 I will read it to you. And, incidentally, when you retire
18 to deliberate, copies of the indictment will be handed to
19 you which you may take into the jury room:

20 "From on or about the 1st day of May, 1976,
21 and continuously thereafter up to and including the date
22 of the filing of this indictment" -- which was what, Mr.
23 Lavin?

24 MR. LAVIN: August 26th.

25 THE COURT: -- August 26, 1976, "in the

2 Southern District of New York, Jacques Berenguer, also
3 known as Guy Sebbane, and Josalito Garcia, the defendants,
4 and others to the Grand Jury unknown, unlawfully, inten-
5 tionally and knowingly combined, conspired, confederated and
6 agreed together and with each other to violate" certain
7 sections of the United States law.

8 "2. It was part of said conspiracy that the
9 said defendants unlawfully, intentionally and knowingly
10 would distribute and possess with intent to distribute
11 Schedule I and II narcotic drug controlled substances, the
12 exact amount thereof being to the Grand Jury unknown, in
13 violation of" various laws.

14 The indictment goes on to allege various overt
15 acts in pursuance of the alleged conspiracy and to effect
16 the objects thereof. I'll come back to the overt acts in
17 a few moments.

18 As you have just heard, the indictment refers
19 to Schedule I and II narcotic drug controlled substances,
20 and I instruct you that cocaine is a Schedule II narcotic
21 controlled substance.

22 The second count of the indictment reads as
23 follows:

24 "On or about the 20th day of May, 1976, in the
25 Southern District of New York, Jacques Berenguer, also

known as Guy Sebbane, and Josalito Garcia, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II controlled substance, to wit, approximately 23.91 grams of cocaine."

Each of these two counts which I have just read to you charges a separate crime and must be considered separately by you.

Although the indictment names two defendants, only Guy Sebbane is on trial before you, not Mr. Garcia. It is only his guilt or innocence which you must announce in your verdict, although in considering his guilt or innocence you may have to determine the nature of the participation, if any, of Mr. Garcia and any of the unindicted coconspirators.

But in the determination of guilt or innocence as to this defendant you must bear in mind that guilt is personal. The case stands or falls upon the proof or lack of proof of the charge against Guy Sebbane only and not against somebody else.

You may not draw any inference favorable or unfavorable towards the Government or the defendant from the fact that only one defendant is on trial now before you or that certain persons were not named as defendants. These matters are wholly outside your concern and have no

1 jg 9

2 bearing on your function as jurors.

3 Now going back to the conspiracy count, these
4 are the elements that you must find beyond a reasonable
5 doubt in order to find the defendant guilty of conspiracy:

6 First, that sometime between May 1, 1976 and
7 August 26, 1976 an agreement existed among the defendants
8 or between the defendants and another person other than a
9 Government agent.

10 Second, that it was part of this agreement to
11 distribute and to possess with the intent to distribute
12 cocaine.

13 Third, that the defendant knowingly and wilfully
14 associated himself with the conspiracy.

15 And fourth, that any one of the conspirators,
16 whether the defendant on trial or any other alleged con-
17 spirator, knowingly committed at least one of the overt
18 acts set forth in the indictment at or about the time and
19 place alleged.

20 And, as I said, I'll come back to the overt
21 acts in a moment.

22 Now, taking those four elements, first, what
23 is a conspiracy? A conspiracy is a combination, an agree-
24 ment or an understanding of two or more persons by concerted
25 action to accomplish a criminal or unlawful purpose, here

to distribute and possess with intent to distribute cocaine. The gist of the crime is the unlawful combination or agreement to violate the law. The success or failure of a conspiracy is immaterial to the question of guilt or innocence of a conspirator.

A conspiracy has sometimes been called a partnership for criminal purposes in which every partner becomes the agent of every other partner. However, to establish a conspiracy the Government is not required to show that two or more persons sat around a table and orally or in writing entered into a solemn compact stating that they had formed a conspiracy to violate the law, setting forth details of their plans, the means by which the unlawful project is to be carried out or the part to be played by each conspirator.

Indeed, it would be extraordinary if there were such a formal agreement either written or oral. Common sense will tell you that when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. The very nature of a conspiracy calls for secrecy, rendering detection difficult.

Thus, it is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law. Express

language or specific words are not required to indicate assent or attachment to the conspiracy. Proof concerning the accomplishment of the goal of a conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. However, even if the conspiracy should fail of its purpose, it is still punishable as a crime.

In determining whether there has been an unlawful agreement or understanding, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators. However, these acts and conduct, when taken together in connection with each other and with the reasonable inferences flowing therefrom, may show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If upon consideration of all the evidence, direct or circumstantial, you find beyond a reasonable doubt that the minds of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the existence of the conspiracy is established.

As to the second element, that is, that it was part of this agreement to distribute and to possess with the intent to distribute cocaine, the Government's proof may, but need not, establish both of these objectives of the conspiracy. If you find that the agreement had as an objective either one of these unlawful activities, then you may be satisfied that the existence of a conspiracy is established.

If you determine beyond a reasonable doubt that a conspiracy existed as charged, then we come to the third element, that the defendant knowingly and wilfully associated himself with a conspiracy. This requires the Government to establish that the defendant participated in a conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives. To determine a defendant's membership in a conspiracy you must consider, on all the evidence and reasonable inferences to be drawn therefrom, whether he knowingly and intentionally participated in it.

Thus, a defendant's mere knowledge of the existence of a conspiracy or of any illegal act on the part of an alleged conspirator or his mere association or close friendship with one or more alleged conspirators is not sufficient to establish his membership in the conspiracy.

1 jg 13

2 The Government must establish beyond a reasonable doubt
3 that the defendant you are considering was aware of the
4 conspiracy's basic purpose and object and that he entered
5 into the conspiracy with a specific criminal intent, that
6 is, a purpose to violate the law.

7 On the other hand, to become a member of a
8 conspiracy a defendant need not know all the other members
9 of the conspiracy nor be fully informed as to all the
10 details of the conspiracy. Each member may perform
11 separate and distinct acts and at different times. Some
12 conspirators may play major roles while others play minor
13 roles. But if a defendant, with understanding of the
14 unlawful character of the conspiracy, intentionally
15 engaged, advised or assisted for the purpose of furthering
16 the illegal undertaking, he thereby becomes a knowing and
17 wilful participant.

18 I've talked about acting knowingly and with
19 intent. Obviously, these are things that exist in the
20 mind. It is not possible to look into one's mind to see
21 what went on. So the only way you have for arriving at a
22 decision concerning these questions is for you to take into
23 consideration all the facts and circumstances shown by
24 the evidence and to determine from all such facts and cir-
25 cumstances whether the requisite knowledge and intent were

present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

The terms "unlawfully, wilfully and knowingly" mean you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily and not because of accident, mistake, carelessness, inadvertence or some other innocent reason. It is not necessary, of course, that the defendant knew he was violating any particular law. It is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Once you have found a conspiracy to exist and that the defendant knowingly participated in it, the extent of his individual participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent or the duration of his participation. Even if he participated in it to a degree more limited than that of the other coconspirators, he is equally culpable, so long as he was in fact a conspirator.

When people enter into a conspiracy to accomplish an unlawful end, they become agents for one another in carrying out the conspiracy. Hence, the acts or declarations of one conspirator in the course of the conspiracy

2 and in furtherance of the common purpose are deemed to be
3 the acts of all and all are responsible for such acts.

4 Accordingly, if you find, in accordance with
5 these instructions, that the alleged conspiracy existed
6 and that the defendant here was a participant in it, then
7 acts done and statements and declarations made or conduct
8 taken in furtherance of the conspiracy by any other person
9 found by you to have been a member of the conspiracy may
10 be considered against the defendant here even though such
11 acts or declarations were made in the absence and without
12 the knowledge of this defendant.

13 It is important to note that this principle
14 applies only to the acts and declarations done or made
15 during the continuance of the conspiracy and in furtherance
16 thereof. It does not apply to acts or declarations which
17 do not have these characteristics.

18 The indictment charges that the conspiracy
19 existed from on or about the 1st day of May until the date
20 of the indictment. It is not essential that the Government
21 prove that the conspiracy started and ended on or about
22 these specific dates. It is sufficient if you find that
23 in fact a conspiracy was formed and existed for some time
24 within the period set forth and that at least one of the
25 overt acts, which I am just about to come to, was committed

in furtherance thereof within that period.

As I've indicated the fourth essential element of the crime of conspiracy is that an overt act intended to effect the object of the conspiracy had been committed by at least one of the conspirators after the unlawful agreement was made.

An overt act is a step, a statement, an action, conduct taken to achieve or further the objective of the conspiracy. The overt act need not be criminal, nor the very crime which is the object of the conspiracy. Thus, the overt acts listed in the indictment are not necessarily by themselves criminal or illegal.

If you find that any of these acts were committed for the purpose of advancing the unlawful enterprise, regardless of whether it was an act which by itself would be innocent, then the overt act requirement has been satisfied. The overt acts in the indictment are as follows:

1. On or about May 14, 1976, in the Southern District of New York, Jacques Berenguer, also known as Guy Sebbane, the defendant, met with an agent of the drug Enforcement Administration and offered to sell approximately five kilograms of cocaine for \$40,000 a kilogram.

2. On or about May 18, 1976, in the Southern

District of New York, Jacques Berenguer, also known as Guy Sebbane, and Josalito Garcia, the defendants, met with an agent of the Drug Enforcement Administration at the Howard Johnson Motor Inn, 869 Eighth Avenue, New York City.

3. On or about May 20, 1976, in the Southern District of New York, Jacques Berenguer, also known as Guy Sebbane, and Hosalito Garcia, the defendants, met with an agent of the Drug Enforcement Administration at Rudi's Bar and Grill, 44th Street and Ninth Avenue, New York City.

4. On or about May 20, 1976, in the Southern District of New York, Josalito Garcia sold to an agent of the Drug Enforcement Administration approximately 23.91 grams of cocaine for \$1,200 as a sample of a future sale of five kilograms of cocaine.

It is not necessary for the Government to prove that all the members of the conspiracy committed or participated in a particular overt act, since as I have said the act of anyone done in furtherance of the conspiracy becomes the act of all the other conspirators.

Also, the Government is not required to prove each of the overt acts. It is sufficient if it proves the commission of at least one of the overt acts at or about the time alleged.

Now, as to Count Two, which I read to you and

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2 which in substance charges that on the 20th day of May,
3 1976, Jacques Berenguer, also known as Guy Sebbane, and
4 Josalito Garcia, unlawfully, wilfully and knowingly did
5 distribute and possess with intent to distribute 23.91
6 grams of cocaine, before you can find the defendant guilty
7 of the crime charged in Count Two of this indictment, you
8 must be convinced beyond a reasonable doubt that the
9 Government has proved the following elements:

10 First, that on or about May 20, 1976, the
11 defendants did distribute or possess with intent to distrib-
12 ute a narcotic drug controlled substance.

13 Second, that he did so unlawfully, wilfully
14 and knowingly.

15 And thrid, that the substance charged to have
16 been possessed with intent to distribute is in fact a
17 narcotic drug controlled substance.

18 You will remember, from what I said about the
19 conspiracy count, that the clause "to distribute or
20 possess with intent to distribute" is in the alternative.
21 So you may find the first element satisfied if you are
22 satisfied either that the defendant distributed cocaine or
23 that he possessed cocaine with intent to distribute. You
24 need not find that he did not.

25 The word "distribute" means the actual,

constructive or attempted transfer of the item. The word "possess" has a common, everyday meaning, that is, to have something within one's control. But to have something within one's control does not necessarily mean to have it in your hand or in your pocket.

There are two kinds of possession, actual or constructive. Actual possession means that a defendant has personal, manual, physical control over narcotics. Constructive possession means that although the narcotics are in the physical possession of another person, the defendant knowingly has power to exercise control over them or their distribution. Such control may be demonstrated by a working relationship between the person having such control and the person whose actual physical custody or by the ability of such person to dictate the movement or disposition of the narcotics.

Either type of possession may be proved by direct or circumstantial evidence or by a combination of both.

The word "intent" refers to a person's state of mind. Thus, the phrase "possess with intent to distribute" can fairly be stated to mean to control an item with the state of mind or purpose of transferring that item.

2 As to the element "unlawfully, wilfully and
3 knowingly," as I have previously explained to you, you must
4 be satisfied beyond a reasonable doubt that the defendant
5 knew what he was doing and that he did it deliberately and
6 voluntarily and not because of a mistake, an accident,
7 inadvertence, negligence or some other innocent reason.
8 An act is wilful if it is done knowingly and deliberately,
9 with an evil motive or purpose. "Unlawfully" means
10 contrary to the law.

11 As to the third element of the substantive
12 count, the indictment charges that the narcotic drug
13 involved is cocaine. You will recall that the parties
14 have stipulated that the substance in question is cocaine.

15 Now, as to Count Two, the Government also
16 relies on the aiding and abetting statute. It is not
17 necessary for the Government to show that the defendant
18 Berenguer, Guy Sebbane, physically committed the offense
19 charged himself. Section 2 of Title 18 of the U. S. Code
20 provides that a person who "aids, abets, counsels, commands,
21 induces or procures" the commission of "an offense against
22 the United States" is as equally punishable as the person
23 who commits the offense directly himself.

24 This means that to find the defendant aided
25 or abetted another to commit a crime, you must find that

the defendant in some way associated himself with the criminal venture, that he participated in it as in something he wished to bring about, or in other words that he sought by his actions to make it succeed.

To find the defendant guilty of aiding and abetting, you must, of course, find something more than mere knowledge on his part that a crime was being committed, for a mere spectator at a crime is not a participant.

But in order to convict, it is not necessary that you find that the defendant himself did the acts, since participation in the crime can be found if you find the defendant induced or aided another person to commit the crime.

Thus, participation by the defendant may be shown by any act which you find was committed by the defendant and which involved his participation in the crime.

This evidence of a defendant's participation may be circumstantial evidence, from which you can conclude that the defendant was participating in the crime. It is sufficient if the Government establishes, as I have stated, beyond a reasonable doubt that the defendant showed by what he said or did that he sought to help the success of the crime.

I have mentioned to you two types of evidence, direct evidence and circumstantial evidence. Direct evidence is where a witness testifies to what he or she saw, heard or observed or he or she knows of his own knowledge, something which came to him or her by virtue of his or her senses. Circumstantial evidence is evidence of facts or circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts. There is the simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Also assume that in this courtroom the blinds are drawn, the drapes are drawn, you cannot look outside. As you are sitting here, somebody walks in with an umbrella which is dripping wet and then somebody else walks in with a raincoat which is also dripping wet.

Now, you cannot look out of the courtroom and you cannot see whether or not it is in fact raining. But on the combination of the facts which I have just asked you to assume it would be reasonable and logical for you to

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2 conclude that it has been raining. That's all there is
3 about circumstantial evidence. You infer, on the basis
4 of reason and experience, from an established fact the
5 existence of some other fact.

6 Circumstantial evidence is of no less value
7 than direct evidence. As a general rule, the law makes
8 no distinction between direct and circumstantial evidence
9 but simply requires that before convicting a defendant the
10 jury must be satisfied of the defendant's guilt beyond a
11 reasonable doubt from all the evidence in the case.

12 There are times when different inferences may
13 be drawn from a certain set of facts. An inference is
14 a deduction or a conclusion which the jury is permitted to
15 draw from facts which have been established by either direct
16 or circumstantial evidence. But an inference is not
17 drawn by speculation or guesswork but, rather, must be
18 arrived at by an exercise of your reason, your common
19 sense.

20 So, while you are considering the evidence
21 presented, you are permitted to draw from the facts which
22 you find to have been proven not what counsel tells you
23 the facts are but what you find the facts to be from the
24 evidence, and from such facts you are permitted to draw
25 such reasonable inferences as seem justified in the light

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2 of your experience.

3 Here again let me emphasize, whether based on
4 direct or circumstantial evidence or the logical, reason-
5 able inferences drawn from such evidence, you must be
6 satisfied of the guilt of the defendant beyond a reasonable
7 doubt.

8 As I've mentioned, you are the sole judges of
9 the credibility and truthfulness of each witness. In
10 weighing the testimony of each witness, you should
11 consider his relationship to the Government, the extent
12 of the witness' interest in the outcome of the case, his
13 manner of testifying, his appearance and conduct while
14 on the witness stand, his intelligence, the strength or
15 weakness of his recollection, and the extent to which he has
16 been corroborated or contradicted, if at all, by other
17 credible witnesses.

18 The ultimate question for you to decide is,
19 did the witness tell the truth? And to this end you
20 use your everyday common sense. Because a particular
21 witness may be a law enforcement officer, such as an
22 agent of the Drug Enforcement Administration, that does
23 not mean that his testimony is deserving of any special
24 consideration or any greater weight by reason of that
25 fact.

2 If you find that any witness has deliberately
3 testified falsely as to any material fact, you may dis-
4 regard all of his testimony or you may accept that part
5 of his testimony which you believe is truthful and which
6 you find to be corroborated or supported by other evidence
7 in the case.

8 There is no duty upon either side in this
9 case to call witnesses whose testimony would be merely
10 cumulative of testimony already in evidence.

11 You are not to be guided or swayed in any
12 manner by sympathy in your deliberations or discussions.
13 You are to be guided solely by the evidence in the case.
14 The crucial question you must ask yourselves as you sift
15 through the evidence is where do you find the truth. The
16 only effort is to find out what is the truth, and justice
17 triumphs only if you find out what the truth is.

18 You are to determine the guilt or innocence
19 of the defendant solely on the basis of the evidence or
20 the lack of evidence before you and subject to the law as
21 I have charged you. If you have a reasonable doubt as
22 to the defendant's guilt, you should not hesitate for any
23 reason to find a verdict of acquittal. But, on the other
24 hand, if you should find that the Government has met its
25 responsibility in proving the defendant's guilt beyond a

reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

A few final instructions. During the trial, from time to time there have been objections made by one or the other of the parties. It is the duty of a lawyer, as I'm sure you recognize, to object when he believes he should, and you should not be prejudiced in any way against anybody because of an objection made or because of my ruling on an objection.

As I told you at the outset, you cannot allow a consideration of the punishment which may be inflicted upon a defendant if convicted to influence your verdict in any way or to enter into your deliberations. The duty of imposing sentence rests exclusively with the Court.

In your deliberations you should exchange views with your fellow jurors, you should discuss and consider the evidence, listen to each other's arguments, present your own views, and reach a unanimous verdict as to the defendant on each count based solely on the evidence, if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case and after discussion with your

1 fellow jurors. Do not hesitate to reexamine your views
2 and to change your opinion when, after discussion, it
3 appears that you are in error. But if, after carefully
4 considering all the evidence in the case and after consid-
5 ering the arguments of your fellow jurors, you still have
6 a conscientious view which differs from the rest of the
7 jury, you are not to yield your view simply because you
8 are outnumbered.
9

10 If, in the course of your deliberations, you
11 wish to examine any of the exhibits, if you wish to have
12 any of the testimony read, or if there is anything else
13 which you need from me, Madam Foreman, you will hand a
14 note to the marshal and we will do everything we can to
15 help you.

16 In communicating with me, Madam Foreman, do
17 not in any way indicate what your vote at the moment might
18 be. Remember that you must return a verdict separately
19 on each count and that your verdict must be unanimous on
20 each count.

21 Your oath sums up your duty: Without fear or
22 favor to anyone, you will truly try the issues between
23 this defendant and the Government based solely upon the
24 evidence and my instructions as to the law. This is
25 important to the Government. It is important to the

2 defendant.

3 Counsel?

4 (At the side bar)

5 MRS. ROSNER: Your Honor, at one point, and I'm
6 sure it was inadvertent, you misspoke and said the burden
7 was always on the defendant, and I didn't want to interrupt
8 you, and I'm sure it was inadvertent, your Honor.

9 The only other thing, Judge, is our charge
10 on association is worded in the conjunctive; that is, that
11 mere association, even coupled with knowledge, does not
12 make one a conspirator. And I mention it only because
13 what is the leading case on point is United States v.
14 Terrell, my case, where Judge Metzner was reversed for
15 failing to so charge, and I feel it is incumbent upon me
16 to advise your Honor of that.

17 THE COURT: Say that again.

18 MRS. ROSNER: It has to be in the conjunctive,
19 Judge, not in the alternative. It has to be mere
20 association even coupled with knowledge, not one or the
21 other.

22 That's all I have, Judge.

23 (Pause)

24 THE COURT: I did read it in the conjunctive.
25 There were "ors" after each phrase.

2 What about that, Mr. Lavin?

3 MR. LAVIN: I'm sorry, your Honor.

4 THE COURT: Do you have any problem with the
5 request that she has just made?

6 MR. LAVIN: No.

7 THE COURT: So what you want me to say is that
8 mere association even coupled with knowledge is not enough?

9 MRS. ROSNER: I feel it is incumbent on me to
10 tell the Court.

11 THE COURT: Yes. Thank you.

12 Do you have anything?

13 MR. LAVIN: I forgot to get the copy of the
14 indictment during the lunch hour.

15 THE COURT: I'll tell them I'll have it for
16 them shortly.

17 All right.

18 (In open court)

19 THE COURT: Counsel points out to me, ladies
20 and gentlemen, that at some point in my charge, and I
21 don't remember where, I reminded you about the Government's
22 burden. I meant to say the burden is always on the
23 Government. Counsel indicates that at some point I said
24 the burden is on the defendant.

25 Of course that is incorrect. The burden of

2 proof beyond a reasonable doubt is always on the Govern-
3 ment and remains with the Government from the outset to
4 the end.

5 Secondly, I want to supplement one portion
6 of my charge on membership by the defendant in a conspiracy.
7 I told you that a defendant's mere knowledge of the exist-
8 ence of a conspiracy or his mere association with one
9 or more alleged conspirators is not sufficient to estab-
10 lish membership in the conspiracy.

11 It is equally true that a defendant's mere
12 knowledge of the existence of a conspiracy coupled with
13 association or friendship with one or more of the alleged
14 conspirators is not sufficient to establish membership
15 in the conspiracy.

16 Anything else, counsel?

17 MRS. ROSNER: No, your Honor.

18 THE COURT: Now, ladies and gentlemen, I
19 promised to give you the indictment. We will get it to
20 you in just two or three minutes and we will hand copies
21 into the jury room.

22 (The two alternate jurors were
23 discharged.)

24 (A United States Marshal was sworn.)

25 (At 3.12 p.m., the jury retired to

2 commence their deliberations.)

3 (At 4.35 p.m., in open court.)

4 THE COURT: I have a note from the jury which
5 reads: "Question: Definition of 'entrapment'."

6 I am open to suggestions.

7 MR. LAVIN: Your Honor, I think the jury should
8 be instructed that they are to disregard any issue of
9 entrapment since there is none in the case, that they are
10 to follow the law as you gave it.

11 THE COURT: Well, the issue certainly hasn't
12 been raised.

13 MRS. ROSNER: May I have a moment, your Honor?

14 (Pause)

15 THE COURT: Mr. Clerk, would you mark that as
16 Court Exhibit 1.

xxx

17 (Court Exhibit 1 was marked.)

18 MRS. ROSNER: Your Honor, I think we ought to
19 tell the jury that they may have reread any portion of the
20 charge which was originally given to them but that you
21 cannot at this point supplement it with anything not
22 previously given.

23 THE COURT: I think that's all right.

24 MR. LAVIN: Your Honor, I would object to
25 that. I think that is really just avoiding the issue.

There is no entrapment in this case. There is no defense of entrapment. Somebody on the jury obviously is making up issues and they should be instructed --

THE COURT: The way Mrs. Rosner puts it to me, I can say I will be glad to read back to them any portion of the charge which contains the law applicable to this case, that I can't supplement it with anything else.

MR. LAVIN: That doesn't really answer their question, your Honor, because there could be some juror who thinks there is something about entrapment in the charge.

THE COURT: I will say the charge contains the law applicable in this case.

MR. LAVIN: I just wonder if you might qualify it and say, in addition, there is no entrapment, entrapment is not an issue, there is no law in my charge on entrapment.

MRS. ROSNER: The reason I suggested not going beyond what I said, Judge, was we don't know what it is really that they are thinking about when they come out with the word "entrapment"; we don't know what their reasoning is or what issues they have in mind. So I think the safest thing is just to say --

THE COURT: I think I can say what you said, with one addition. I will say that I did not use the

word "entrapment" in my charge. -

MRS. ROSNER: I think they probably know that the word "entrapment" wasn't in there, because they are asking for something more.

THE COURT: I think that is another way of saying that it shouldn't have been in my charge.

MRS. ROSNER: I think we tread on dangerous territory, Judge, if we do anything more than say to them "You can have reread what I already charged you and that's it," because we really don't know what it is that they are getting to. Maybe they will come out with another note which we can respond to with something that is in the charge or the evidence.

MR. LAVIN: Your Honor, I think that note is very specific. "Entrapment" is certainly a legal term. They haven't heard it in this courtroom, because it hasn't been raised. And I think that to start talking about whether or not -- they should be told, I think directly, there is no such issue here and there is not going to be any problem about it.

THE COURT: What about this? Suppose I say: The issue of entrapment has not been raised. I will be glad to read back to you any portion of my charge which contains the law applicable to this case, but I can't

1 supplement it as to any other legal issues which haven't
2 been raised.
3

4 MRS. ROSNER: The reason I thought that wasn't
5 wise, Judge, is this: As lawyers, we know, for instance,
6 that entrapment depends on a showing that a Government
7 agent, as opposed to a non-Government agent, did something
8 to involve the defendant in a crime. The jury obviously
9 doesn't know that, because they are sending out a note
10 asking what this concept entrapment is about.

11 They may be discussing among themselves factual
12 issues about the relationship between Josalito Garcia, who
13 would not qualify as an entrapping agent under the law,
14 and this defendant. But they may have a question about
15 the relationship of these two men.

16 So to send back that kind of answer not only
17 doesn't meet what they may be talking about but may
18 actually indirectly tell them something which isn't
19 correct, for instance that they can't consider the relation-
20 ship between Josalito and this defendant.

21 That's why I thought it was unwise to do that,
22 your Honor. I think they know the word isn't in the
23 charge, they know they didn't hear anything about that.
24 So I think the safest thing to do is to say to them, "I
25 can repeat to you at this point any portion of the charge

which I gave to you, but I cannot supplement it." And it seems to me that that is saying to them they are bound by whatever principles you gave them and they can't get or receive any other instruction except what you've already given.

MR. LAVIN: Your Honor, I think Mrs. Rosner is interpreting the note and trying to guess what the jury really means. The jury asked for the question of entrapment, nothing else, and there is no issue in this case of entrapment, there is no law on entrapment. They should be told that.

I think, if we send back a note saying, "Well, you can have any portion of the charge read," that is not going to really answer their question, because they have to be told that they have to follow the law in this case.

THE COURT: I've been trying to write down something here which might work, but what I've written down doesn't quite do it. I would like to take a couple of minutes to think about it.

(Pause)

Counsel, this is what I've worked out, which is supposed to take into account the points that both of you have made:

"Entrapment is a legal concept. I did not

cover this concept in my charge because the legal concept has not been raised in this case. I will be glad to read back to you any portion of my charge, but I cannot supplement it with any explanation of legal concepts which are not involved.

"However, if you wish me to explain or amplify any of the legal instructions as to the law applicable to this case, I will be glad to do so."

MR. LAVIN: Couldn't the jury be told that entrapment is not applicable to this case at all, period?

THE COURT: My problem with that is that somebody obviously has some notion about entrapment.

MR. LAVIN: That's correct, your Honor.

THE COURT: And is confused about it.

MR. LAVIN: Well, they have a notion about it.

THE COURT: And this is a way of saying to them that entrapment as a legal concept is not here involved.

It seems to me that some of the aspects of the entrapment defense could conceivably be taken into account by the jury properly within the framework of my charge, and I am thinking perhaps of the credibility of some of the Government's witnesses.

MR. LAVIN: Your Honor, I think that is reading into the jury's note what they might mean. But I think

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2 the note is pretty clear, and entrapment is not an issue
3 and I think they should be told that.

4 THE COURT: Doesn't that say it?

5 MR. LAVIN: I don't have any quarrel with most
6 of it. I just think they should be told that it is not
7 an issue, that it plays no part in the case.

8 THE COURT: First, what do you think of what
9 I've read, Mrs. Rosner?

10 MRS. ROSNER: The defendant doesn't object.
11 It is a difficult note to answer and I think the Court did
12 the best under the circumstances. The defendant doesn't
13 object to it, Judge.

14 MR. LAVIN: I would just like the note to say
15 at some point that entrapment, the legal theory of entrap-
16 ment, is not an issue in this case and they shouldn't
17 consider it.

18 THE COURT: I say it twice. I say "the legal
19 concept which hasn't been raised in this case" and also
20 "a legal concept which is not involved" in this case.

21 MR. LAVIN: My only quarrel is with the first
22 one, that it hasn't been raised. That would leave the
23 impression that they could raise it.

24 THE COURT: I will change "not raised" to "not
25 involved" both times.

All right, get the jury, please.

(At 4.50 p.m., jury present.)

THE COURT: Madam Foreman, ladies and gentlemen, I have your note, which reads: "Question: Definition of 'entrapment'."

Entrapment is a legal concept. I did not cover this concept in my charge because the legal concept has not been raised and is not involved in this case. I will be glad to read back to you any portion of my charge, but I cannot supplement it with any explanation of legal concepts which have not been raised and are not involved in this case.

However, if you wish me to explain or amplify any of the legal instructions as to the law applicable to this case, I will be glad to do so.

All right. Thank you.

(At 4.53 p.m., the jury again retired to continue their deliberations.)

(At 5.05 p.m., Court Exhibit 2 marked.)

(At 5.45 p.m., in open court)

THE COURT: I have another note. This note reads:

"Count 2. The charge indicates that the defendant did wilfully and knowingly distribute and

possess Schedule II controlled substance.

"Question: Does this mean actual physical possession of this controlling substance or involvement and/or association with the distribution of the controlled substance?"

As you know, I am going to dismiss the jury for today. What I propose to do is to dismiss them now. What I propose to do in answer to this is to read them the portion of my charge which talks about actual and constructive possession and the aiding and abetting section.

MRS. ROSNER: I think that is appropriate, Judge. I would like to see the note, though, before I finally commit myself. But I think that is appropriate.

THE COURT: I don't propose to do that tonight. I thought I had better do that first thing in the morning.

MRS. ROSNER: Okay.

MR. LAVIN: Are you going to ask the jury if they reached a partial verdict on any of the counts?

MRS. ROSNER: I would hardly think it would be appropriate at this time.

THE COURT: No, I don't think so, Mr. Lavin.

MR. LAVIN: From the note I thought that they had.

(Jury present)

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2 THE COURT: Madam Foreman and ladies and
3 gentlemen, we are going to adjourn for the day at this
4 point.

5 I have your last note, which deals with Count
6 Two. I thought it better, since we are going to adjourn,
7 for me to deal with that first thing in the morning.

8 I would like to ask you to reassemble tomorrow
9 morning at nine o'clock. As soon as all twelve of you
10 have assembled, you may resume your deliberations, but not
11 until all twelve of you are reassembled tomorrow morning
12 at nine o'clock.

13 At nine o'clock I will deal with this question
14 which you have just sent me.

15 Once again, remember, you may not discuss this
16 case among yourselves outside of the jury room or with
17 anybody else. Pay no attention to anything that you
18 might see in the newspapers or on television or hear on
19 radio.

20 Good evening. I'll see you tomorrow morning
21 at nine o'clock.

22 (The jury left the courtroom.)

23 (Court Exhibit 3 was marked.)

24 (An adjournment was taken to Friday,
25 November 19, 1976 at 9.00 a.m.)

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2 UNITED STATES OF AMERICA

3 vs.

4 JACQUES BERENGUER, a/k/a
5 Guy Sebbane

6 New York, N. Y.

7 November 19, 1976 - 9.15 A.M.

8
9 (Trial resumed, in the absence of the
10 jury.)

11 THE COURT: Do you all have in mind the note
12 that we got last night?

13 I have a message, Mrs. Rosner, that you want
14 me to add to the aiding and abetting charge the statement
15 that mere knowledge of a crime and association or close
16 friendship with a participant is not sufficient.

17 MRS. ROSNER: Yes, your Honor.

18 THE COURT: That was the charge you asked me
19 to give before, I think.

20 MRS. ROSNER: Yes, Judge.

21 THE COURT: I don't have any problem with
22 that.

23 MRS. ROSNER: Thank you.

24 THE COURT: And then what I propose to do is
25 to read the entire aiding and abetting charge, with that

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2 one addition, and also the charge on the difference between
3 actual and constructive possession.

4 Is that agreeable to both of you?

5 MRS. ROSNER: Yes.

6 MR. LAVIN: Yes, your Honor.

7 I just had a chance to reread the note and I
8 have the question here: "Does this mean actual physical
9 possession of the controlled substance?" I think the
10 answer to that is no. And then I think the jury should
11 be instructed as to what the difference between actual and
12 constructive is and be given the aiding and abetting
13 charge.

14 I think it is quite clear from both my summation
15 and the Court's charge that he is not charged with actually
16 physically possessing the cocaine and that is not required
17 for his conviction on that count.

18 THE COURT: I don't think I need to start out
19 by saying no. I'll just reread the charge.

20 MR. LAVIN: Okay. Fine.

21 (Jury present)

22 THE COURT: Good morning.

23 You will recall that just before we adjourned
24 yesterday evening you gave me a note, which reads as
25 follows:

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2 "Count 2. The charge indicates that the
3 defendant did wilfully and knowingly distribute and
4 possess Schedule II controlled substance.

5 "Question: Does this mean actual physical
6 possession of this controlling substance or involvement
7 and/or association with the distribution of the controlled
8 substance?"

9 I would like to read to you two portions of my
10 charge which I think will answer your question.

11 The word "possess" has a common, everyday
12 meaning, that is, to have something within one's control.
13 But to have something within one's control does not neces-
14 sarily mean to have it in your hand or pocket.

15 There are two kinds of possession, actual and
16 constructive. Actual possession means that a defendant
17 has personal manual or physical control of the narcotics.
18 Constructive possession means that although the narcotics
19 are in the physical possession of another person, the
20 defendant knowingly has power to exercise control over
21 them or their distribution.

22 Such control may be demonstrated by a working
23 relationship between the person having such control and
24 the person with actual physical custody or by the ability
25 of such person to dictate the movement or disposition of

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2 the drugs. Either type of possession may be proved by
3 direct or circumstantial evidence or a combination of
4 both.

5 Then the aiding and abetting charge.

6 The Government relies for Count Two on the
7 aiding and abetting statute. It is not necessary for the
8 Government to show that the defendant Sebbane physically
9 committed the offense charged. Section 2 of Title 18
10 of the United States Code provides that a person who aids,
11 abets, counsels, commands, induces or procures the commis-
12 sion of an offense against the United States is as equally
13 punishable as the person who commits the offense directly
14 himself.

15 Now, what does this mean? It means that to
16 find the defendant aided or abetted another to commit a
17 crime you must find that the defendant in some way
18 associated himself with the criminal venture, that he
19 participated in it as in something he wished to bring
20 about, or, in other words, that he sought by his actions
21 to make it succeed.

22 Mere knowledge of a crime and association or
23 close friendship with a participant is not sufficient.
24 To find a defendant guilty of aiding and abetting, you
25 must, of course, find something more than mere knowledge

on his part that a crime was being committed, for a mere spectator at a crime is not a participant.

But, in order to convict, it is not necessary that you find that the defendant himself did any of the acts, since participation in the crime can, for example, be found if you find that the defendant induced or aided another person to commit the crime.

Thus, participation by the defendant may be shown by any act, even of relatively slight importance, which you find was committed by the defendant and which involved his participation in the crime.

This evidence of a defendant's participation may be circumstantial evidence from which you conclude the defendant was participating in this crime. It is sufficient that the Government establish, as I have stated, that the defendant showed by what he said or did that he sought to help the success of the crime.

All right, ladies and gentlemen. Thank you.

(At 9.24 a.m., the jury again retired to continue their deliberations.)

(At 9.55 a.m., jury present.)

THE CLERK: Ladies and gentlemen of the jury, please answer to your presence as your name is called.

(Jury roll called - all present)

CERTIFICATE OF SERVICE

June 13 , 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silbermann